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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/765,193
Filing Date: January 28, 2004
Appellant(s): SILVA, GUILLERMO

Albert Bordas
For Appellant

SUPPLEMENTAL
EXAMINER'S ANSWER

This is in response to the appeal brief filed November 3, 2006 appealing from the Office action mailed 4-7-06.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,763,607	Beyerinck et al.	7-2004
26114 A	Tayag	2-1992

Leaflet No. 8 - 1983 - "Green coconut drink", Coconut, South Pacific Commission - Community Health Services - South Pacific Foods, pages, 1-8.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the

invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1 and 7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Leaflet No. 8, 1983, in view of Tayag (PH26114) and Beyerinck et al (6,763,607).

Leaflet No. 8, 1983 discloses that it is known to make a beverage from green coconuts (page 9, under "Green coconut drink), which contains coconut water, and green coconut meat. Claim 1 differs from the reference in the use of a spray dried base from water, sugar and coconut cream powder and in the particular method of spray drying. However, spray dried coconut cream is known as disclosed by Tayag (abstract). The cream contains maltodextrin as in claim 1. This coconut cream powder further contains sugar. However, nothing new or unobvious is seen in the addition of sugar for its known function of adding sweetness. Beyerinck et al. disclose spray-drying using atomized droplets sprayed into a heated chamber and a cyclone (col. 27, lines 40-70 and col. 28-60). Even though the composition of the reference is different, the process is known. The reference to Tayag discloses that it is known to spray dry coconut cream. In addition, no weight is given to the method of making the product in a composition claim. Claim 1 is also a product by process claim. The fact that the procedures of the reference are different than that of applicant is not a sufficient reason for allowing the product-by-process claims since the patentability of such claims is based upon the product formed and not the method by which it was produced. See In re Thorpe 227 USPQ 964. The burden is upon applicant to submit objective evidence to support their position as to the product-by-process claims. See Ex parte Jungfer 18 USPQ 2D 1796. Therefore, it would have been obvious to make a beverage using the

process of Beyerinck to make the spray-dried coconut cream of Tayag in the composition of Leaflet No. 8.

Claim1 further requires that the beverage be like the jelly-like meat of an immature coconut. However, as the ingredients have been shown such a consistency would have been developed from the recipe. Therefore, it would have been obvious to make a beverage of the claimed consistency.

Claim 1 further requires that the coconut mean contains mainly water and is jelly-like which is collected, bleached and mixed with preservatives. As green coconut meat is used as in the claim, the coconut meat is seen to contain as much water and to be jelly- like. As the coconut meat only needs to be mixed with coconut water the flesh would have been jelly- like. The green coconut is fresh in the recipe, however, if canned it would have been within the skill of the ordinary worker to bleach a material that would darken and to add preservatives for their known use. Therefore, it would have been obvious to use a coconut product as claimed.

Claim 7 further requires vanilla extract, which is a well-known ingredient used for flavoring foods and beverages. Attention is invited to In re Levin, 84 USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no

one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients, which produces a new, unexpected, and useful function. In re Benjamin D. White, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. Therefore, it would have been obvious to use a known flavorant for its known use.

(10) Response to Argument

Appellant argues that the claimed invention is different from Leaflet since Leaflet makes a coconut drink from raw coconut and that appellant does not claim to have invented spray drying the mixture of coconut milk to make a spray dried coconut cream product, but that claim 1 is to a rich creamy coconut mixture containing the coconut cream powder which is made from a spray- drying process and that water is added to the liquid base, and the composition also contains preserved young coconut meat and sugar and ice, and that Appellant teaches how to make a coconut mixture that is a cream. However, the reference to Leaflet discloses that it is known to make a beverage from raw green coconut. Appellant has access to canned green coconut, but never makes any claim to developing the canned green coconut product, which therefore must be a known ingredient. Tayag (PH 26114A) discloses that the powdered coconut milk is made by spray drying with maltodexrin and sodium caseinate. This mixture is considered to be a coconut cream powder. Nothing new is seen in adding water and sugar to a powder to rehydrate it and to sweeten it. Leaflet No. 8, under

Green Coconut Drink discloses that it is well known to make a beverage with green coconut meat. All the ingredients of the claims are known, as in In re Levin, supra, "there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients, which produces a new, unexpected, and useful function".

Appellant argues that Leaflet teaches making a drink having coconut in its raw state. However, the reference was used to show that it is known to make drinks from raw coconut, i. e. green coconut. Appellant is not claiming that the canned green coconut of the claims was invented by them. Nothing inventive is seen in adding these ingredients together. Fruit beverages are generally made from water, fruit and sugar. Each ingredient is used for its known function.

Appellant argues that he is making a coconut cream, but claim 1 is to "A rich creamy coconut mixture". It is a mixture of known ingredients, which are the raw canned coconut meat, a flavorant such as dried coconut cream, water, sugar and vanilla. Mixing such ingredients together would of course produce a creamy mixture since the canned coconut itself is jelly-like (claim 1 (e).

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Helen Pratt

HELEN PRATT
PRIMARY EXAMINER

Conferees: Helen Pratt: , Greg Mills , Milton Cano

Helen Pratt
3-26-07